# Custody Proceedings Involving Multiple Jurisdictions

CHAPTER 13

**In This Chapter...**



## 13.1 Chapter Overview

The parties to relationships involving domestic violence frequently cross jurisdictional lines in their efforts to perpetrate or escape abuse. Difficult enforcement questions arise when these parties turn to the courts of multiple jurisdictions for assistance with their disputes over access to children. This chapter addresses domestic violence as a factor in resolving these questions. The discussion covers the following governing authorities:

- The federal Parental Kidnapping Prevention Act, 28 USC 1738A.
- The Uniform Child Custody Jurisdiction Act, MCL 600.651 et seq.; MSA 27A.651 et seq.
- The Hague Convention on the Civil Aspects of International Child Abduction, and its enabling legislation, 42 USC 11601-11610.

Criminal penalties for parental kidnapping are discussed in Sections 3.5 - 3.6. Full faith and credit for sister state and tribal civil protection orders is discussed in Section 8.13.

## 13.2 Domestic Custody Proceedings Involving Multiple Jurisdictions — The Governing Law

Interstate enforcement of child custody orders issued by U.S. courts has historically* been a source of difficulty due to uncertainty about the

*This historical discussion is taken from *In re Clausen*, 442 Mich 648, 661-665, 669 (1993).

application of the Full Faith and Credit Clause of the U.S. Constitution, US Const, art IV, §1. Uncertainty has existed because custody decrees are generally subject to modification; accordingly, courts felt free to modify prior custody orders issued in other jurisdictions. As a result, parents who were dissatisfied by custody orders issued in one jurisdiction were frequently motivated to transport their children to another jurisdiction in an effort to achieve a more favorable result in a different court.

To combat the problems caused by parental "forum shopping," the National Conference of Commissioners on Uniform State Laws ("NCCUSL") promulgated the Uniform Child Custody Jurisdiction Act ("UCCJA") in 1968.* The UCCJA provides standards for determining whether a state may take jurisdiction of a child custody dispute. It also determines when courts must enforce sister state custody decrees, and sets forth the circumstances under which modification of sister state decrees is permitted.

*The Michigan version appears at MCL 600.651 et seq; MSA 27A.651 et seq.

Because all states did not adopt identical versions or interpretations of the UCCJA, its enactment did not completely do away with uncertainties about interstate enforcement of domestic custody orders. In response to this continuing uncertainty, the U.S. Congress enacted the Parental Kidnapping Prevention Act ("PKPA"), 28 USC 1738A, in 1980. The PKPA requires each state to give full faith and credit to the child custody and visitation determinations of its sister states if these determinations are consistent with the Act's jurisdictional standards and notice requirements. *Thompson v Thompson*, 484 US 174, 182 (1998) (holding that the PKPA is addressed to state courts; it does not provide a private cause of action in federal court to determine the validity of conflicting custody decrees.)

The PKPA is intended to function with the UCCJA in a correlative and complementary fashion.* There are, however, significant differences between the PKPA and the UCCJA. Although the PKPA jurisdictional standards are derived from the UCCJA, the PKPA differs from the UCCJA in that it prohibits concurrent jurisdiction and protects the exclusive jurisdiction of a state that issues a decree consistent with its provisions. Once a state exercises jurisdiction consistent with the PKPA, no other state may exercise concurrent jurisdiction over the custody dispute, even if the other state would have been empowered to take jurisdiction in the first instance. Furthermore, all states must accord full faith and credit to the first state's decree. *Thompson v Thompson, supra*, 484 US at 177.

*Blakesley, *Child Custody — Jurisdiction & Procedure*, 35 Emory L J 291, 339 (1986). See also Goelman, et al, Interstate Family Practice Guide: A Primer for Judges, §§202, 302 (ABA Center on Children & the Law, 1997).

The different standards in the UCCJA and PKPA result in cases where a court might have jurisdiction to decide a custody or visitation dispute under the UCCJA, but not under the PKPA. Where such conflicts occur, the PKPA prevails. *In re Clausen,* 442 Mich 648, 669, n 23 (1993).

The PKPA is also silent regarding certain areas that are covered in the UCCJA. For example, the UCCJA addresses judicial communication, evidence-gathering, and record-keeping in interstate custody cases, subjects that are not addressed in the PKPA. The UCCJA also contains guidelines for

declining to exercise jurisdiction on the basis of forum non conveniens. Where the PKPA is silent, the court should follow the provisions set forth in the UCCJA.

> **Note:** The UCCJA has been widely criticized for its potential to create concurrent jurisdiction in multiple courts. To address this issue, the NCCUSL approved in 1997 a draft of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), which is intended to serve as a replacement for the UCCJA. Michigan had not enacted the UCCJEA as of the publication date of this benchbook. The full text of the UCCJEA appears at www.nccusl.org and www.law.upenn.edu/bll (visited July 26, 2001). Discussion of its provisions appears at Zorza, *The UCCJEA: What Is It and How Does It Affect Battered Women in Child-Custody Disputes,* 27 Fordham Urb L J 909 (2000).

In applying the UCCJA and PKPA in a domestic custody case involving multiple jurisdictions, a Michigan court must make a three-part inquiry:

- Does the Michigan court have jurisdiction under these statutes?
- Has another court previously and properly assumed jurisdiction under these statutes so as to preclude the Michigan court from acting in the case?
- If the Michigan court has jurisdiction, is another court a more appropriate forum under the circumstances of the case?

The following discussion will address each of these three questions in turn.

> **Note:** In addition to providing jurisdictional prerequisites, the PKPA requires that notice and an opportunity to be heard be given to all parties to a custody or visitation dispute before a court order will be entitled to full faith and credit. These parties include "the contestants, any parent whose parental rights have not been previously terminated, and any person who has physical custody of the child." 28 USC 1738A(e). A "contestant" is "a person, including a parent or grandparent, who claims a right to custody or visitation of a child." 28 USC 1738A(b)(2). See MCL 600.654; MSA 27A.654 for notice requirements under the UCCJA. These notice requirements will not be addressed in this discussion.

## 13.3 Does the Michigan Court Have Jurisdiction to Hear the Dispute?

In response to a petition in a child custody or visitation dispute involving another jurisdiction, a Michigan court must first inquire whether it has jurisdiction under one of four bases provided in the PKPA and UCCJA. These jurisdictional bases are: 1) "home state" jurisdiction; 2) "significant connection" jurisdiction; 3) "emergency" jurisdiction; and, 4) "last resort" jurisdiction.* This section will describe and compare the provisions for each basis of jurisdiction under the federal and Michigan statutes, and explore how the statutes operate in situations involving domestic violence.

*The PKPA also provides for "continuing" jurisdiction after a court has made an initial child custody or visitation determination. See Section 13.4(A).

## A. "Home State" Jurisdiction

The PKPA provides for "home state" jurisdiction as follows:

> "[S]uch State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State...." 28 USC 1738A(c)(2)(A).

The "home state" is defined in as follows:

> "[H]ome State" means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period." 28 USC 1738A(b)(4).

The foregoing federal provisions are substantially similar to the "home state" provisions in the Michigan UCCJA:

> "This state is the home state of the child at the time of commencement of the proceeding or had been the child's home state within 6 months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as a parent continues to live in this state." MCL 600.653(1)(a); MSA 27A.653(1)(a).

The UCCJA defines "home state" as:

> "...the state in which the child immediately preceding the time involved lived with his or her parents, a parent, or a person acting as parent, for at least 6 consecutive months, and in the case of a child less than 6 months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of the named persons are counted as part of the 6-month or other period." MCL 600.652(e); MSA 27A.652(e).

Under the PKPA and UCCJA provisions quoted above, a Michigan court may exercise home state jurisdiction in one of two circumstances:

- At the commencement of the proceeding, the child and at least one parent have resided in Michigan for at least six consecutive months (or since the child's birth, if the child is less than six months old).
- At the commencement of the proceeding, the child has been removed from Michigan, but all of the following requirements are met:
  - One parent continues to live in Michigan;

- The child lived in Michigan with one or both parents for at least six consecutive months, or was born in Michigan and removed from the state before reaching six months of age; and,
- The proceeding was initiated within six months after the child was removed from Michigan.

In cases where a parent has brought a child into Michigan from outside the state, the requirements for home state jurisdiction apply regardless of the parent's motivation for doing so — home state jurisdiction will not apply until the statutory residency requirements are met.

In cases where a parent has taken a child from Michigan, the parent left behind may invoke the Michigan court's home state jurisdiction if the child meets the statute's residency requirements. The court's jurisdiction will expire unless the parent initiates the action within six months after the child's removal from Michigan, however. This rule applies regardless of whether the parental taking was motivated by abuse or the flight from abuse.

## B. "Significant Connection" Jurisdiction

The PKPA provides for "significant connection" jurisdiction where:

> "(i)...it appears that no other State would have [home state jurisdiction], and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant,* have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships...." 28 USC 1738A(c)(2)(B).

*A "contestant" is "a person, including a parent or grandparent, who claims a right to custody or visitation of a child." 28 USC 1738A(b)(2).

Under the foregoing statute, a court may exercise significant connection jurisdiction only if "it appears that no other State would have [home state] jurisdiction." This restriction is a significant change from the corresponding UCCJA provision, which provides for "significant connection" jurisdiction without deference to the child's home state. The UCCJA allows a court to take jurisdiction where:

> "[i]t is in the best interest of the child that a court of this state assume jurisdiction because the child and his parents, or the child and at least 1 contestant, have a significant connection with this state and there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships." MCL 600.653(1)(b); MSA 27A.653(1)(b).

Unlike the PKPA, the UCCJA permits a court to exercise significant connection jurisdiction concurrently with another court having home state jurisdiction, treating these jurisdictional bases as equal alternatives. See, e.g., *Braden v Braden*, 217 Mich App 331, 335 (1996). Thus, in cases where a parent has brought a child into Michigan from outside the state, the UCCJA permits a Michigan court to assert significant connection jurisdiction, even if the child's home state is elsewhere. To prevent problems arising from the

concurrence of jurisdiction in this situation, the PKPA gives home state jurisdiction priority over significant connection jurisdiction. Since the PKPA prevails over the UCCJA in cases of conflict, a Michigan court should consider the PKPA's full faith and credit restrictions before asserting significant connection jurisdiction. Orders issued by a Michigan court exercising significant connection jurisdiction concurrently with a court in the child's home state are not entitled to full faith and credit under the PKPA, even though they may be permissible under the UCCJA.

A party does not need to establish a child's residence in Michigan to invoke significant connection jurisdiction under the PKPA and UCCJA. Significant connection jurisdiction is established where:

- The child and at least one parent have a significant connection with Michigan; and,
- Substantial evidence concerning the child's present or future care, protection, training, and personal relationships is available in Michigan.

While the child's physical presence in Michigan is "desirable" for significant connection jurisdiction, it is neither required nor determinative of whether jurisdiction exists. MCL 600.653(2)-(3); MSA 27A.653(2)-(3). In deciding whether to exercise "significant connection" jurisdiction, Michigan courts have looked to factors such as duration of the child's stay in a state, extended family members living in a state, school enrollment, and location of health care providers. See, e.g., *Farrell v Farrell*, 133 Mich App 502, 509 (1984), and *Dean v Dean*, 133 Mich App 220, 226 (1984).

## C. "Emergency" Jurisdiction

In applying the UCCJA and PKPA jurisdictional standards in cases where domestic violence is at issue, the provisions for emergency jurisdiction in MCL 600.653(1)(c); MSA 27A.653(1)(c) and 28 USC 1738A(c)(2)(C) are of particular significance. The PKPA provides for "emergency" jurisdiction as follows:

> "[T]he child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child *because the child, a sibling, or parent of the child has been subjected to or threatened with mistreatment or abuse.*" 28 USC 1738A(c)(2)(C). [Emphasis added.]

The UCCJA provides a narrower scope of "emergency" jurisdiction than does the PKPA. Under the UCCJA, "emergency" jurisdiction exists where:

> "[t]he child is physically present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse *or is otherwise neglected or dependent*." MCL 600.653(1)(c); MSA 27A.653(1)(c). [Emphasis added.]

The PKPA defines an emergency in terms of threatened or actual harm to the child, the child's sibling, or the child's parent, while the UCCJA defines an emergency only in terms of harm or threatened harm to the child. There is no appellate case authority for a Michigan court to extend its emergency jurisdiction under the UCCJA to situations where a child's parent is subject to domestic violence.* Abuse of a parent is significant to a child's welfare, however. When children are exposed to adult abuse as observers, participants, or victims, they may suffer harm sufficient to invoke a court's protection under the UCCJA's emergency provisions. Moreover, adult abuse often occurs concurrently with child abuse. See Section 1.7 on the effects of domestic violence on children. In *Bull v Bull*, 109 Mich App 328, 342-343 (1981), overruled on other grounds in *In re Clausen*, 442 Mich 648, 675 (1993), the Court of Appeals held that a Michigan circuit court had emergency jurisdiction where a party alleged that her former spouse had abused her and threatened to take the child out of the country. Trial courts in other states with emergency jurisdiction provisions similar to those in MCL 600.653(1)(c); MSA 27A.653(1)(c) have also asserted emergency jurisdiction based on a petitioner's statement that she and her children had been abused by the children's father. See *Horiba v Horiba*, 950 P2d 340, 342 (Ore App, 1997).

*Arguably, the PKPA would require a Michigan court to recognize emergency jurisdiction exercised in that situation by a court in another state. See *In re Clausen*, 442 Mich 648, 669, n 23 (1993).

In deciding whether to invoke emergency jurisdiction under the UCCJA, some commentators encourage courts to narrowly construe their powers to deter parents from abducting their children and then alleging an emergency in an effort to justify their actions and obtain jurisdiction in a more favorable forum. These commentators suggest that any alleged emergency be serious, significant, immediate, and based on credible evidence. They further suggest that emergency jurisdiction not be used to permanently modify a custody order; rather, it should be invoked as a temporary solution to give a party custody for as long as it takes to travel with the child to the appropriate forum to seek a permanent order, as long as this is consistent with the interests of the child. Permanent modification would be appropriate only in the narrow situation where the evidence of abuse was solely available at the location of the court exercising emergency jurisdiction. Even in this situation, however, the problem of availability might be solved by taking testimony in one location and transmitting it to another.* See *Murphy v Danforth*, 915 SW2d 697, 702 (Ark, 1996); *Curtis v Curtis*, 789 P2d 717, 723 (Utah App, 1990); and Blakesley, *Comparativist Ruminations from the Bayou on Child Custody Jurisdiction,* 58 La L R 449, 479-485 (1998).

*See Section 13.8 on the UCCJA provisions for interstate evidence gathering.

To make a well-informed determination in cases where emergency jurisdiction is at issue, it is important for a court to contact any other court involved with the case to discuss the best place to resolve the dispute. For a discussion of communication requirements under the Michigan UCCJA, see Section 13.6.

## D. "Last Resort" Jurisdiction

The PKPA provides for "last resort" jurisdiction where:

*Continuing jurisdiction arises after a court has made an initial child custody or visitation determination consistently with the PKPA. See Section 13.4(A).

> "(i)...it appears that no other State would have [home state, significant connection, emergency, or continuing jurisdiction],* or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody or visitation of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction." 28 USC 1738A(c)(2)(D).

This provision is substantially similar to the UCCJA, which provides for "last resort" jurisdiction where:

> "[i]t appears that no other state would have jurisdiction under prerequisites substantially in accordance with subdivisions (a), (b), or (c) [governing home state, substantial connection, and emergency jurisdiction] or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child and it is in the best interest of the child that this court assume jurisdiction." MCL 600.653(1)(d); MSA 27A.653(1)(d).

To assert "last resort" jurisdiction under the PKPA and UCCJA, a court must make the following determinations:

- No other court has home state, significant connection, emergency jurisdiction, or continuing jurisdiction; or,
- A court with home state, significant connection, emergency, or continuing jurisdiction has declined to exercise it because Michigan is a more appropriate forum;* and,
- It is in the best interest of the child for a Michigan court to assume jurisdiction.

*Grounds for declining to exercise jurisdiction are discussed in Section 13.5.

Communication between the different courts involved in an interstate custody dispute is critical to making informed decisions about assuming last resort jurisdiction. This subject is addressed in Section 13.6.

## 13.4 Has Another Court Properly Assumed Jurisdiction?

The PKPA requires Michigan courts to give full faith and credit to sister state custody orders that meet the statute's notice and jurisdictional standards:

> "The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in...this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State." 28 USC 1738A(a).

The UCCJA contains a similar provision:

> "The courts of this state shall recognize and enforce an initial or modification decree or judgment of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with [the UCCJA] or which was made under factual circumstances meeting the jurisdictional standards of [the UCCJA]

> as long as this decree or judgment has not been modified in accordance with jurisdictional standards substantially similar to those of [the UCCJA]." MCL 600.663; MSA 27A.663.

> **Note:** Although Indian tribes are not mentioned in the definition of "state" that appears in the PKPA at 28 USC 1738A(b)(8), a federal appeals court has held that Indian tribes are subject to its provisions. *In re Larch* 872 F2d 66, 68 (CA 4, 1989). This construction is consistent with 28 USC 1738B, which specifically applies to Indian tribes, and provides for full faith and credit to child support orders made consistently with its provisions. The UCCJA makes no provision for Indian tribes.

To comply with the above statutes, a Michigan court must follow its examination of its own jurisdictional status with an inquiry into whether another court has already properly exercised jurisdiction in the case before it. If another court has acted previously, the Michigan court's ability to assert jurisdiction will depend upon the procedural posture of the case in both courts.

## A. Another Court Has Issued a Custody Determination and Continues to Have Jurisdiction

The PKPA contains the following provision for "continuing" jurisdiction:

> "The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as [such court continues to have jurisdiction under the laws of such State] and such State remains the residence of the child or of any contestant."* 28 USC 1738A(d).

*A "contestant" is "a person, including a parent or grandparent, who claims a right to custody or visitation of a child." 28 USC 1738A(b)(2).

The PKPA concept of continuing jurisdiction has no counterpart in the UCCJA. Under the PKPA's continuing jurisdiction provision, the initial court's jurisdiction continues to the exclusion of all others as long as:

- The initial court has jurisdiction under its own laws;
- The initial determination was made consistently with the notice and jurisdictional requirements of the PKPA; and,
- The initial court's jurisdiction remains the residence of the child or of any contestant.

For a case in which the Michigan courts' jurisdiction over a child custody dispute was excluded by another state's continuing jurisdiction under the PKPA, see *In re Clausen*, 442 Mich 648, 671-674 (1993).

## B. Modification of Another Court's Order When It No Longer Has Jurisdiction or Declines to Exercise Jurisdiction

Under the PKPA, modification of another court's custody decree or judgment will not be given full faith and credit, except in cases meeting the following prerequisites:

> "(1)[The modifying court] has jurisdiction to make such a child custody determination; and
>
> "(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination." 28 USC 1738A(f).

Similarly, modification of another court's visitation determination will not be given full faith and credit unless "the court of the other State no longer has jurisdiction to modify such determination or has declined to exercise jurisdiction to modify such determination." 28 USC 1738A(h).

Like the corresponding provision in the PKPA, MCL 600.664(1); MSA 27A.664(1) permits Michigan courts to modify other states' custody decrees only in exceptional cases, as follows:

> "If a court of another state has made a custody decree or judgment, a court of this state shall not modify that decree or judgment unless it appears to the court of this state that the court which rendered the decree or judgment does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with [the UCCJA] or has declined to assume jurisdiction to modify the decree or judgment and the court of this state has jurisdiction."

Both the Michigan UCCJA and the PKPA authorize modification in cases meeting the following prerequisites:

- The other court does not have jurisdiction at the time of the request for modification; or,
- The other court has declined to assume jurisdiction to modify the decree or judgment; and,
- The Michigan court has jurisdiction.

*See Section 13.4(A) on continuing jurisdiction, and Section 13.5 on grounds for declining jurisdiction.

As a practical matter, the foregoing modification statutes and the PKPA's continuing jurisdiction provision will limit a Michigan court's authority to modify another court's valid custody or visitation order to cases where:

- The court that issued the order declines to take jurisdiction; or,
- The jurisdiction where the order was issued is no longer the residence of the child or any contestant. (Unless the court in that location has jurisdiction based on some other grounds than continuing jurisdiction.)*

*For more on communication between courts, see Section 13.6.

If a Michigan court is authorized to modify another state's custody decree under MCL 600.664(1); MSA 27A.664(1), it must give consideration to the transcript of the records and other documents of all previous proceedings. MCL 600.664(2); MSA 27A.664(2). These documents must be requested from the other state under MCL 600.672; MSA 27A.672.*

## C. Simultaneous Proceedings Initiated in Michigan and Another Jurisdiction

In some cases, a litigant may file a custody or parenting time petition in Michigan after his or her opponent has filed a similar petition in another jurisdiction, but before the other court has made its determination. If the Michigan court exercises jurisdiction in this situation, the PKPA will not accord full faith and credit to the Michigan court's orders:

> "A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody or visitation determination." 28 USC 1738A(g).

This federal provision differs significantly from the UCCJA's provision on the same subject. The UCCJA restricts courts from acting in cases where simultaneous proceedings are pending in another state, but contains exceptions for emergencies and for situations where the other court declines to exercise jurisdiction. MCL 600.656(1); MSA 27A.656(1) provides:

> "A court of this state shall not exercise its jurisdiction under [the UCCJA] if at the time of filing the petition a proceeding concerning the custody of the child is pending in a court of another state exercising jurisdiction* substantially in conformity with [the UCCJA], *unless the proceeding is stayed by the court of the other state because this state is a more appropriate forum or for other reasons or unless temporary action by a court of this state is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent.*" [Emphasis added.]
>
> **Note:** The definition of "emergency" under this statute is identical to the definition that applies for purposes of emergency jurisdiction under MCL 600.653(1)(c); MSA 27A.653(1)(c). For a discussion of how this definition applies in cases involving domestic violence, see Section 13.3(B).

*To "exercise jurisdiction," the other state's court must have issued some order indicating its assumption of jurisdiction following filing of the petition. *Braden v Braden,* 217 Mich App 331, 336-337 (1996).

Because the PKPA prevails in case of conflict with state law, other courts will not be obligated to give full faith and credit to orders issued by a Michigan court that takes jurisdiction over a simultaneous proceeding under one of the exceptions listed in MCL 600.656(1); MSA 27A.656(1). However, the PKPA does not prohibit a Michigan court from exercising temporary emergency jurisdiction simultaneously with another court. If a Michigan court decides to exercise emergency jurisdiction despite the difficulty with full faith and credit, it can minimize potential conflict by taking the following steps:*

*Goelman, et al, Interstate Family Practice Guide: A Primer for Judges, §202 (ABA Center on Children & the Law, 1997)

- Communicate promptly with the other court upon learning of another pending proceeding, as required by MCL 600.656(3); MSA 27A.656(3). See Section 13.6 regarding communication between courts.
- Stay proceedings if the other court indicates that it will act promptly on the emergency allegations.

- If emergency jurisdiction is exercised, do only what is necessary to protect the child from the immediate crisis. Limit relief to a temporary order of sufficient duration to address the emergency.
- Direct the petitioner to file in the court with jurisdiction to make permanent custody orders.

Communication between the courts involved is critical to making informed decisions in cases involving simultaneous proceedings. Procedures for making inquiry into proceedings in other states are set forth in MCL 600.656(2)-(3); MSA 27A.656(2)-(3). See Section 13.6 for more information about inquiry procedures.

## 13.5 Is Another Court a More Appropriate Forum?

Even though a Michigan court may have jurisdiction over a case under one of the four bases listed in the PKPA or UCCJA, it may decline to exercise its authority because another forum is more appropriate or because a petitioner has engaged in reprehensible conduct.

### A. Inappropriate Forum

In deciding whether another court would be a more appropriate forum, the court must determine the interest of the child in light of the following factors listed in MCL 600.657(3); MSA 27A.657(3):*

*The inconvenient forum issue may be raised on the court's own motion or on motion of a party. MCL 600.657(2); MSA 27A.657(2).

- Whether another state is or recently was the child's home state.
- Whether another state has a closer connection with the child and his family or with the child and one or more of the contestants.
- Whether substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state.
- Whether the parties have agreed on another forum which is no less appropriate.
- Whether the exercise of jurisdiction in Michigan would contravene any of the purposes of the UCCJA as stated in MCL 600.651; MSA 27A.651. Some of these purposes include avoiding jurisdictional conflict, deterring child abduction, and avoiding relitigation of other states' custody determinations.

Although domestic violence is not mentioned in MCL 600.657(3); MSA 27A.657(3), the statute's list of factors is nonexclusive. *Lustig v Lustig*, 99 Mich App 716, 726 (1980). Thus, a court may consider safety in deciding whether to defer to another forum. Other factors courts have considered include:

- Having the same judge who issued the original divorce judgment preside over subsequent petitions for modification. *Breneman v Breneman,* 92 Mich App 336 (1979).

- The economic disparity between the parties and disruptions to the children. *In re Marriage of Cervetti*, 497 NW2d 897 (Iowa, 1993).

In determining the "interest of the child" under MCL 600.657(3); MSA 27A.657(3), it may be helpful to recall that "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child" is a "best interest" factor for purposes of custody and parenting time determinations under the Child Custody Act. MCL 722.23(k); MSA 25.312(3)(k). See also Section 1.7 on the effects of domestic violence on children.

If a Michigan court finds that it is an inconvenient forum, it must also determine that a court of another state is a more appropriate forum before declining to exercise jurisdiction. MCL 600.657(1); MSA 27A.657(1); see also *Johnson v Keene*, 164 Mich App 436, 447 (1987) (partial concurrence by Judge Caprathe). This determination will prevent the parties from being without a forum in which to resolve their dispute.

If the court declines jurisdiction, it may dismiss the proceedings, or take the following actions to protect the parties:

- Stay the proceedings upon condition that a custody proceeding be commenced promptly in another state or upon other conditions that may be just and proper, including the condition that a moving party stipulate his or her consent and submission to the jurisdiction of the other forum. MCL 600.657(5); MSA 27A.657(5).
- If the custody determination is incidental to an action for divorce or another proceeding (e.g., a personal protection action), retain jurisdiction over the divorce or other proceeding. MCL 600.657(6); MSA 27A.657(6).

See Section 13.6 for a discussion of communication requirements under the inconvenient forum provisions of the UCCJA.

## B. Reprehensible Conduct

MCL 600.658; MSA 27A.658 provides another basis for declining to exercise jurisdiction in cases where the petitioner has engaged in "reprehensible conduct." This statute does not mention domestic violence. It defines "reprehensible conduct" only insofar as it involves wrongful taking or detention of a child or violation of a custody order:

- The court may decline to exercise jurisdiction over a petition for an initial decree if the petitioner wrongfully took the child from another state or engaged in "similar reprehensible conduct." MCL 600.658(1); MSA 27A.658(1).
- Unless required "in the interest of the child," the court shall not exercise jurisdiction to modify another state's custody order if the petitioner, without the consent of the person entitled to custody, improperly removed the child from the physical custody of the person entitled to custody or improperly retained the child after a visit or other

> temporary relinquishment of physical custody. If the petitioner has violated another provision of another state's custody order, the court may decline to exercise its jurisdiction "if this is just and proper under the circumstances." MCL 600.658(2); MSA 27A.658(2).

Although the foregoing provisions do not specify the role that domestic violence should play in a court's decision to decline jurisdiction under the UCCJA, MCL 600.658(1); MSA 27A.658(1) clearly applies in cases where the acts constituting abuse include the wrongful taking or detention of children. In cases where the abused party has taken children and fled in violation of a custody order, MCL 600.658(2); MSA 27A.658(2) permits the court to exercise jurisdiction despite the violation if this would be "in the interest of the child," or "just and proper under the circumstances." In *Dean v Dean*, 133 Mich App 220, 227 (1984), the Court of Appeals indicated that the totality of the situation and the best interest of the child should guide a court in deciding whether to decline jurisdiction. The panel noted that "not all wrongful action cognizable under §658 requires that jurisdiction be declined." In *Green v Green*, 87 Mich App 706, 714 (1978), the Court of Appeals made the following observation regarding the UCCJA's "clean hands" principle:

> "In the final analysis the court should not decline jurisdiction under the clean hands principle to punish the parent at the expense of the child....[A custody] determination should, whenever feasible, be made by the court most likely to decide correctly, i.e., by the court having maximum access to the relevant evidence." [Citations omitted.]

In determining the "interest of the child" under MCL 600.658(2); MSA 27A.658(2), it may be helpful to recall that "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child" is a "best interest" factor for purposes of custody and parenting time determinations under the Child Custody Act. MCL 722.23(k); MSA 25.312(3)(k). See also Section 1.7 on the effects of domestic violence on children.

An Oregon appellate court has held that a mother's flight with children to escape the father's abuse of her and her children did not constitute reprehensible conduct for purposes of that state's counterpart to MCL 600.658; MSA 27A.658. In *Horiba v Horiba*, 950 P2d 340, 343 (Ore App, 1997), the court stated:

> "Given the substantial allegations and evidence of anger and abuse, the doctrine of clean hands would not preclude jurisdiction on the allegation petitioner was unjustified, reprehensible, and wrong in taking the children [from Japan] to the United States. Petitioner presents tenable grounds and reasons for her conduct."

## 13.6 Judicial Communication Under the UCCJA

When the parties to a relationship involving domestic violence bring their child access dispute before multiple courts, communication between these

courts is vital to prevent violence and manipulation of the judicial system. Recognizing that a judge needs complete information about the parties' situation in order to adequately meet their needs, the UCCJA requires courts to communicate with one another about the proceedings before them, and provides mechanisms for sharing information.

## A. Simultaneous Proceedings in Other States

MCL 600.656(2)-(3); MSA 27A.656(2)-(3) contain the following communication requirements that are designed to alleviate the problems caused by simultaneous custody proceedings in different states:

- Before it hears a petition in a custody proceeding governed by the UCCJA, a Michigan court must examine the pleadings and other information supplied by the parties, and consult the child custody registry* concerning pending proceedings in other states. If the court has reason to believe that proceedings may be pending in another state, it must direct an inquiry to the state court administrator or other appropriate official of the other state.

*The child custody registry is described in MCL 600.666; MSA 27A.666. See Section 13.7.

- If a Michigan court learns during the course of a proceeding that another proceeding was pending in another state before it assumed jurisdiction, it must stay its proceeding and communicate with the other court to determine which is the more appropriate forum. The Michigan court must also communicate with the court in the other state regarding information to be exchanged. MCL 600.656(3); MSA 27A.656(3). In *Braden v Braden*, 217 Mich App 331, 337 (1996), the Court of Appeals found that a Michigan trial court had erred by declining jurisdiction over a custody matter without first contacting a Florida court to determine the status of a divorce action filed there prior to commencement of the Michigan proceeding. See also *Moore v Moore*, 186 Mich App 220, 225-227 (1990) (trial court failed to obtain adequate information to support its decision to decline jurisdiction under MCL 600.656(1); MSA 27A.656(1)).
- If a Michigan court issues a custody order before being informed of a pending proceeding in another state, it must immediately inform the other court of this fact. MCL 600.656(3); MSA 27A.656(3).
- If a Michigan court learns that a proceeding has been commenced in another state after it has assumed jurisdiction, it must contact the other court to determine which is the more appropriate forum. MCL 600.656(3); MSA 27A.656(3).

## B. Determining the Most Appropriate Forum

MCL 600.657; MSA 27A.657 provides for communication between courts with concurrent jurisdiction to facilitate a determination as to which is the most appropriate forum.

- Before deciding whether to decline or retain jurisdiction, a court may communicate with a court in another state and exchange information pertinent to the assumption of jurisdiction by either court with a view to assuring that jurisdiction will be exercised by the more appropriate

court and that a forum will be available to the parties. MCL 600.657(4); MSA 27A.657(4).

- Upon dismissing or staying proceedings, the court declining to exercise jurisdiction must inform the more appropriate court of this fact. If the court which would have jurisdiction in the other state is not certainly known, the court declining to exercise jurisdiction must transmit the information to the court administrator in the other state for forwarding to the appropriate court. MCL 600.657(8); MSA 27A.657(8).
- A communication received from another state informing this state of a finding of inconvenient forum because a court of this state is the more appropriate forum shall be filed in the custody registry of the appropriate court. Upon assuming jurisdiction, the court of this state shall inform the original court of this fact. MCL 600.657(9); MSA 27A.657(9).

The Court of Appeals has encouraged judges to decline jurisdiction by order. *Green v Green*, 87 Mich App 706, 712 (1978). However, the Court in *Green* found no error where Texas and Michigan judges communicated by telephone as to which court should exercise its concurrent jurisdiction to modify a Texas custody decree, and confirmed by letter their agreement that Michigan was the appropriate forum.

## 13.7 Record-Keeping Requirements Under the UCCJA

To facilitate a court's efforts to gather information about a case from its counterpart in another state, the UCCJA contains the following record-keeping provisions:*

*For discussion of confidentiality of records in interstate actions, see Section 10.4(G).

- A party may file a certified copy of another state's custody decree in the office of the clerk of a court of Michigan. The clerk shall treat the decree in the same manner as a Michigan decree. MCL 600.665; MSA 27A.665
- A registry containing certified copies of custody orders filed from other states, and communications and documents from other states must be maintained by the clerk of each circuit and probate court. MCL 600.666; MSA 27A.666.
- The clerk of the circuit or probate court must certify and forward a copy of a Michigan decree or judgment upon request of the court of another state or a person affected by the Michigan decree or judgment. MCL 600.667; MSA 27A.667.
- Courts must preserve documents in custody proceedings until the child reaches 18 years of age. These documents include pleadings, orders, decrees or judgments, records made of hearings, social studies, and other pertinent records. These documents must be forwarded to (and may be obtained from) courts of others states upon request. These documents must be considered by the Michigan court that takes jurisdiction over a case after a custody decree was rendered in another state. MCL 600.664(1), 600.671, 600.672; MSA 27A.664(1), 27A.671, 27A.672.

## 13.8 Gathering Evidence Safely From the Parties Under the UCCJA

In interstate cases involving domestic abuse, the logistical problems with gathering evidence are exacerbated by the potential for further violence and the possibility that the abusive party may manipulate the proceedings as a tactic for asserting control. To decrease the risk of violence, courts can utilize procedures under the UCCJA that permit the taking of evidence while the parties are separated. To deter abusive manipulation of the proceedings, courts can assess certain costs of interstate litigation against one of the parties where justice requires.

The following procedures can be used to gather evidence from another state:

- In addition to other procedural devices available to a party, testimony of witnesses may be adduced by deposition or otherwise in another state. MCL 600.668; MSA 27A.668.
- One court may request another to assist with evidence-gathering in a variety of ways: holding hearings to adduce evidence; ordering a party to produce or give evidence; and, having social studies made regarding the custody of a child. The assisting court may then forward certified copies of hearing transcripts, evidence, or social studies prepared in compliance with the request. MCL 600.669(1)-600.670(1); MSA 27A.669(1)-27A.670(1).

To prevent abusive parties from manipulating the proceedings, courts can assess certain costs of interstate litigation against them:

- If a court declines to exercise jurisdiction because it is "clearly an inappropriate forum," it may require the party who commenced the proceedings to pay, in addition to the costs of the proceedings in this state, necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses. MCL 600.657(7); MSA 27A.657(7).
- If a court declines to exercise jurisdiction because a petitioner has engaged in reprehensible conduct, the court may order the petitioner to pay the necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses. MCL 600.658(3); MSA 27A.658(3).
- If a person violates another state's custody order and so makes it necessary to enforce the order in Michigan, the person may be required to pay necessary travel and other expenses, including attorneys' fees, incurred by the party entitled to custody or that party's witnesses. MCL 600.665(2); MSA 27A.665(2).
- A Michigan court may direct an out-of-state party to appear personally in the Michigan proceeding with or without the child. If the court so directs (or if an out-of-state party desires to appear personally in Michigan), the court may order another party to pay to the clerk of the court travel and other necessary expenses of the out-of-state party and the child if it is "just and proper under the circumstances." MCL 600.661(3); MSA 27A.661(3).

- A Michigan court may request another state's court to order a party to appear in the Michigan proceeding with the child. This request may state that travel and other necessary expenses of the party and the child will be assessed against another party or will otherwise be paid. MCL 600.669(2); MSA 27A.669(2). For a reciprocal provision governing requests from another state's court to a Michigan court, see MCL 600.670(3); MSA 27A.670(3).

## 13.9 State and Federal Authorities Governing International Cases

When a child is brought into the United States from another country, two civil remedies are available in Michigan courts to secure access to the child:

- **The Uniform Child Custody Jurisdiction Act ("UCCJA"), MCL 600.651 et seq; MSA 27A.651 et seq.**

  The UCCJA provides for Michigan courts to enforce foreign nation custody decrees that meet the Act's jurisdictional and notice standards. It applies regardless of whether the foreign nation has adopted the UCCJA.

- **The Hague Convention on the Civil Aspects of International Child Abduction, 42 USC 11601-11610.**

  Under the Hague Convention, a party in a foreign nation may seek the return of a child under 16 who has been wrongfully taken from the nation of his or her habitual residence and brought to the United States. The Convention also provides for the enforcement of visitation rights to children in the United States. The Michigan courts have concurrent jurisdiction with the federal courts to hear actions under the Convention. Relief is available in cases where both the nation of the child's habitual residence and the nation where the child is located have acceded to the Convention. In such cases, the Convention, as implemented by the federal statutes, preempts the UCCJA.

The following sections provide an overview of the above statutes, with particular attention to domestic violence as a factor in affording relief.

> **Note:** For federal criminal penalties for international child abduction, see 18 USC 1073 and 1204. See Section 3.5 on Michigan's parental kidnapping statute. Section 12.10 addresses measures courts can take in cases where there is a risk of parental abduction or flight.

## 13.10 Applying the UCCJA to International Cases

International application of the UCCJA is governed by MCL 600.673; MSA 27A.673,* which provides:

> "The general policies of [the UCCJA] extend to the international area. The provisions of [the UCCJA] relating to the recognition and enforcement of custody decrees or judgments of other states apply

*This statute does not apply to Indian tribes. See *Oliphant v Suquamish Indian Tribe,* 435 US 191, 208-209 (1978), and cases cited therein.

> to custody decrees or judgments and decrees involving legal institutions similar in nature to custody rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons."

The Michigan Court of Appeals has held that the UCCJA requires recognition and enforcement of child custody decrees entered in a foreign nation if the foreign court's exercise of jurisdiction conformed with the UCCJA's jurisdictional standards and the foreign decree was rendered after reasonable notice and opportunity to be heard. Because the UCCJA is not a reciprocal act, Michigan courts must enforce foreign judgments that meet its criteria, even if the foreign jurisdiction has not adopted the UCCJA. *Klont v Klont,* 130 Mich App 138, 141-142 (1983) (German court's temporary custody order met UCCJA notice and jurisdictional requirements and was enforced); *Farrell v Farrell*, 133 Mich App 502, 510-511 (1984) (Michigan court properly assumed jurisdiction after issuance of Irish court order where Irish court did not provide reasonable notice and opportunity to be heard.) Further discussion of the UCCJA is found in Sections 13.3 to 13.8.

For an international case in which a U.S. court asserted emergency jurisdiction under the UCCJA based on a petitioner's statement that she and her children had been abused by the children's father, see *Horiba v Horiba*, 950 P2d 340, 342 (Ore App, 1997), discussed at 13.3(B) and 13.5(B).

In cases where both the nation of the child's habitual residence and the nation where the child is located have acceded to the Hague Convention on the Civil Aspects of International Child Abduction, the Convention, as implemented by 42 USC 11601 - 11610, may preempt the UCCJA.* See Section 13.11 for more information on the Hague Convention. A general discussion of the federal preemption doctrine appears in *People v Hegedus*, 432 Mich 598 (1989).

*Rigler, *The Epidemic of Parental Child-Snatching: An Overview,* http://travel.state.gov/je_prevention.html, p 7 (visited July 26, 2001).

## 13.11 Applying the Hague Convention to International Cases

The United States is one of 56 nations that are a party to the Hague Convention on the Civil Aspects of International Child Abduction ("Convention"). The enabling legislation for the Convention (42 USC 11601-11610) states that its purpose is two-fold: 1) to "establish legal rights and procedures for the prompt return of children who have been wrongfully removed or retained"; and, 2) to "secur[e] the exercise of visitation rights." 42 USC 11601(a)(4). See also Convention, Article 1.*

To effectuate its purpose, the Convention requires that signatories act promptly to restore the status quo that existed prior to the child's removal from the country in which he or she habitually resides. The Convention is *not* a vehicle for deciding child access questions. Instead, its main purpose is to ensure that abducted children are returned to the country of habitual residence. It presumes that such disputes are properly resolved in the country where the child habitually resides. *Tyszka v Tyszka*, 200 Mich App 231, 235 (1993);

*For the full text of the Convention, see www.hcch.net, or http://travel/state.gov (visited July 26, 2001), or Department of State, *Hague International Child Abduction Convention: Text & Legal Analysis,* 51 Fed Reg 10494 (March 26, 1986) (hereinafter "State Department Analysis").

*Friedrich v Friedrich*, 78 F3d 1060, 1063-1064 (CA 6, 1996); *Currier v Currier*, 845 F Supp 916, 920 (D NH, 1994).

The Convention provides an administrative and a judicial avenue for parties seeking relief. These two remedies are not mutually exclusive; the aggrieved party may pursue one or both of them:

- Administrative assistance in securing a child's return can be obtained by making an application to the designated Central Authority in the nation where the child habitually resides, or in any other nation that is a party to the Convention. Convention, Article 8. The United States has designated the State Department's Office of Children's Issues in the Bureau of Consular Affairs as its Central Authority. 22 CFR 94.2. The address is: U.S. Central Authority, Office of Children's Issues, 2401 E St. N.W., Room L127, Washington, D.C., 20037. The telephone number is 202-736-7000. The fax number is 202-663-2674.
- A party may also initiate judicial proceedings in the nation where the child is located. Convention, Articles 12, 29. In the United States, federal and state courts have concurrent jurisdiction over Hague Convention cases. 42 USC 11603(a). A U.S. state or federal court must give full faith and credit to the judgment of any other U.S. state or federal court entered in an action brought under the Convention. 42 USC 11603(g). One federal appeals court has held that decisions of the courts of foreign nations under the Convention are not entitled to full faith and credit; however, they are entitled to deference under principles of international comity. *Diorinou v Mezitis*, 237 F2d 133, 142-143 (CA 2, 2001).

In addition to the foregoing remedies, the aggrieved party may pursue other available remedies outside the Convention; its provisions are not exclusive. 42 USC 11603(h).

A party initiating judicial proceedings under the Convention may request either: 1) the return of wrongfully taken children; or, 2) "arrangements for organizing or securing the effective exercise of rights of access to a child." 42 USC 11603(b); Convention, Article 1. "Rights of access" include "visitation rights" and "the right to take a child for a limited period of time to a place other than the child's habitual residence." 42 USC 11602(7); Convention, Article 5b.

The remedy to protect a party's "rights of access" is less well-defined than the remedy to secure a child's return. Article 21 of the Convention provides that signatory nations are "bound...to promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights may be subject." Moreover, the authorities in the signatory nations are to "take steps to remove, as far as possible, all obstacles to the exercise of such rights." In *Teijeiro Fernandez v Yeager*, 121 F Supp 2d 1118 (WD Mich, 2000), a federal district court held that federal courts do not have jurisdiction to enforce a petitioner's rights of access under the Convention: "Given the absence of any specific remedy for rights of access [under the Convention], this Court believes that matters relating to access are best left to the state courts, which are more experienced in resolving these issues." 121 F Supp 2d at 1126.

**Note:** To the extent that it is not preempted by the federal enabling legislation for the Convention, the UCCJA may provide more specific remedies for parties seeking to enforce their "rights of access" to children in the Michigan courts. See Goelman, et al, Interstate Family Practice Guide: A Primer for Judges**,** §205 (ABA Center on Children & the Law, 1997).

The rest of this discussion will be devoted to the substantive requirements for judicial proceedings to obtain the return of a child under the Convention. Michigan courts may encounter such proceedings where a parent in a foreign nation brings an action under the Convention alleging that a child was wrongfully taken to or retained in Michigan. A foreign parent might also invoke the Convention's protections in response to a custody action brought in Michigan by the parent who brought the child to this state.

For more information on hearing procedures under the Convention, see Goelman, et al, *supra,* §205. For more information about administrative remedies, see Convention, Article 8; http://travel.state.gov (visited July 26, 2001); and State Department Analysis*,* 51 Fed Reg 10494. Additional cases construing the Convention and its enabling legislation are digested in Rigler, *The Epidemic of Parental Child-Snatching: An Overview,* http:// travel.state.gov/je_prevention. html, p 7 (visited July 26, 2001). A booklet for parents on international child abduction, and resource materials for judges also appear at this web site.

## A. Nations Where the Convention Applies

Under its Article 4, the Convention applies in cases where both the country of the child's habitual residence and the country to which the child was taken have acceded to the Convention. The following chart lists the signatory nations.

**Hague Convention: Signatory Nations (as of July 12, 2001)***

| | | |
|---|---|---|
| Argentina | Greece | Peru |
| Australia | Honduras | Poland |
| Austria | Hungary | Portugal |
| Belarus | Ireland | Romania |
| Belgium | Israel | Saint Kitts and Nevis |
| Brazil | Italy | Slovakia |
| Bulgaria | Japan | Slovenia |
| Canada | Hashemite Kingdom of Jordan | Suriname |
| Chile | Republic of Korea | Spain |
| China | Latvia | Sweden |
| Croatia | Luxembourg | Switzerland |
| Czech Republic | Former Yugoslav Republic of | Turkey |
| Cyprus | Macedonia | United Kingdom of Great |
| Denmark | Malta | Britain and Northern Ireland |
| Egypt | Mexico | United States |
| Estonia | Monaco | Uruguay |
| Finland | Morocco | Venezuela |
| France | The Netherlands | Federal Republic of Yugoslavia |
| Georgia | Norway | |
| Germany | Panama | |

*List taken from www.hcch.net (visited July 26, 2001).

## B. Children Who Are Subject to the Convention; Effect of Existing Custody Decrees

Relief under the Convention is only available until the child in question reaches age 16, regardless of whether the child was wrongfully taken or retained at an earlier age. Children who fall within the scope of the Convention are subject to its protections regardless of whether a court has issued a custody award concerning them. 42 USC 11603(f)(2).

If there is a custody decree, the Convention applies even if the award was made or is entitled to recognition in the nation to which the child was taken. Convention, Article 17.* Under Article 17, a court may take into account the reasons underlying an existing custody decree when it applies the Convention. However, a court cannot refuse to return a child solely on the basis of an order awarding custody to the alleged wrongdoer entered in the state to which the child was taken. Article 17 is designed to ensure that a person who wrongfully removes or retains a child will not escape the Convention's return provisions by obtaining a custody order in the country of new residence.

*State Department Analysis, *supra*.

## C. The Petitioner's Burden of Proof in Actions to Secure the Return of a Child

Petitioners seeking return of a child under the Hague Convention must establish by a preponderance of the evidence "that the child has been wrongfully removed or retained within the meaning of the Convention." 42 USC 11603(e)(1)(A). Once a petitioner makes this showing, the burden shifts to the respondent to establish that one of several exceptions to return (discussed below) applies. If the respondent fails to establish the existence of an exception, the child must be returned to his or her place of habitual residence. Convention, Article 12. If an exception is established, however, return is discretionary. *Krishna v Krishna*, 1997 WL 195439 (No C-97-0021 SC, ND Cal, April 11, 1997).

### 1. "Wrongful Removal"

"Wrongfulness" is defined as follows in Article 3 of the Convention:

> "The removal or the retention of a child is to be considered wrongful where —
>
> "(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> "(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
>
> "The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

Under Article 5a, "rights of custody" include "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." Questions about a person's custody rights are governed by the law of the child's habitual residence. *Whallon v Lynn*, 230 F3d 450, 455-456 (CA 1, 2000) (Mexican law governed custody rights of unmarried father), and *Friedrich v Friedrich*, 983 F2d 1396, 1402 (CA 6, 1993).

In *Harkness v Harkness,* 227 Mich App 581, 587 (1998), the Michigan Court of Appeals required a mother seeking her children's return to Germany to establish the following three elements set forth in Article 3 of the Convention:

- The child's "habitual residence" was in Germany prior to their retention in the United States;
- The mother had either sole or joint rights of custody concerning the children under German law; and,
- At the time the children were retained in the United States, the mother was exercising her custodial rights.

See also *Teijeiro Fernandez v Yeager,* 121 F Supp 2d 1118, 1124 (WD Mich, 2000), finding that no material issue of fact existed with respect to a petitioner's claim that his children had been wrongfully removed from Spain, where the record demonstrated that he only had a right of access to them.

### 2. "Habitual Residence"

The question of "habitual residence" is among the most-litigated issues under the Convention. The Convention does not define a child's "habitual residence." In *Friedrich v Friedrich,* 983 F2d 1396, 1401 (CA 6, 1993), the U.S. Court of Appeals for the Sixth Circuit noted that "habitual residence" is a flexible concept that bears no real distinction from "ordinary residence." The Sixth Circuit cited the following language from *In re Bates,* No CA 122.89, High Court of Justice, Family Div'n Ct Royal Court of Justice, United Kingdom (1989):

> "It is greatly to be hoped that the courts will resist the temptation to develop detailed and restrictive rules as to habitual residence, which might make it as technical a term of art as common law domicile. The facts and circumstances of each case should continue to be assessed without resort to presumptions or pre-suppositions." 983 F2d at 1401.

In determining a child's "habitual residence" for purposes of the Hague Convention, the court in *Friedrich, supra,* 983 F2d at 1401-1402, set forth the following guidelines:

- A child's citizenship is not determinative of habitual residence.
- A person can have only one habitual residence.
- "On its face, habitual residence pertains to customary residence prior to the removal. The court must look back in time, not forward."

- "[H]abitual residence can be altered only by a change in geography and the passage of time, not by changes in parental affection and responsibility. The change in geography must occur before the questionable removal."

See also *Harkness v Harkness, supra,* 227 Mich App at 596 ("Habitual residence should not simply be equated with the last place that the child lived"), and *Feder v Evans-Feder*, 63 F3d 217, 224 (CA 3, 1995) ("A child's habitual residence is the place where he or she had been physically present for an amount of time sufficient for acclimatization and which has a degree of settled purpose from the child's perspective....[The court's determination] must focus on the child and consists of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there.")

If the child's habitual residence in another country was established because the petitioner fled the United States to avoid criminal penalties, the petitioner may be disentitled to access to U.S. courts. See *Degen v United States,* 517 US 820 (1996), and *Prevot v Prevot*, 59 F3d 556 (CA 6, 1995) (convicted felon who fled to France was disentitled to seek return of his children in the U.S. district court). However, in a case involving a petitioner who left the United States while subject to civil contempt sanctions, the U.S. Court of Appeals for the Sixth Circuit upheld the district court's refusal to apply the fugitive disentitlement doctrine, finding that "disentitlement will generally be too harsh a sanction in a case involving an ICARA petition [i.e., a petition under the enabling legislation for the Hague Convention]." *March v Levine,* 136 F Supp 2d 831, 856-861 (MD Tenn, 2000), aff'd 249 F3d 462, 470 (CA 6, 2001). See also *Walsh v Walsh,* 221 F3d 205 (CA 1, 2000) (court would not apply the disentitlement doctrine to a petitioner who absconded to Ireland prior to trial on criminal charges, finding among other things that its application "would impose too severe a sanction in a case involving parental rights.")

## D. Exceptions to Return of a Child — The Respondent's Burden of Proof

If the petitioner in an action to return a child meets his or her burden of proof as described above, the burden shifts to the respondent to show that one of several exceptions to return apply. If the respondent fails to show that an exception exists, the court must "order the return of the child forthwith." Convention, Article 12. If the respondent establishes an exception to return, however, the mandatory return of the child is made discretionary. *Krishna v Krishna*, 1997 WL 195439 (No C-97-0021 SC, ND Cal, April 11, 1997).

The Convention provides the following exceptions to the mandatory return of a child:

- There is "a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an

intolerable situation." Convention, Article 13b. The respondent must prove this grounds for refusing to return the child by clear and convincing evidence. 42 USC 11603(e)(2)(A). More discussion of this exception appears at Section 13.12(C).

- **F** The return of the child "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms." Convention, Article 20. The respondent must prove this grounds for refusing to return the child by clear and convincing evidence. 42 USC 11603(e)(2)(A). For a case discussing this exception, see *March v Levine, supra*, 136 F Supp 2d at 854-855.
- **F** If more than one year has elapsed from the date of the alleged wrongful removal or retention, the respondent must prove by a preponderance of the evidence that the child has now presently settled in its new environment. Convention, Article 12; 42 USC 11603(e)(2)(B). For a case discussing this exception, see *Blondin v Dubois*, 238 F3d 153, 164 (CA 2, 2001).
- **F** The petitioner was not exercising his or her custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention. Convention, Article 13a. The respondent must prove this grounds for refusing to return the child by a preponderance of the evidence. 42 USC 11603(e)(2)(B). For discussion of this exception, see *Whallon v Lynn,* 230 F3d 450, 459 (CA 1, 2000) and *Ostevoll v Ostevoll,* 2000 WL 161123 (No C-1-99-961, SD Ohio, August 16, 2000).
- **F** The child "objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views." Convention, Article 13b. The respondent must prove this grounds for refusing to return the child by a preponderance of the evidence. 42 USC 11603(e)(2)(B). For discussion of this exception, see *Blondin v Dubois, supra*, 238 F3d at 165-168, *Raijmakers-Eghaghe v Haro,* 2001 WL 256009 (No CIV. 000-40433, ED Mich, March 15, 2001), and *Ostevoll v Ostevoll, supra.*

Article 13 of the Convention further provides that "[i]n considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

The foregoing exceptions are to be narrowly construed. 42 USC 11601(a)(4). They "are not a basis for avoiding return of a child merely because an American court believes it can better or more quickly resolve a dispute." *Friedrich v Friedrich*, 78 F3d 1060, 1067 (CA 6, 1996). See also *Walsh v Walsh,* 221 F3d 204, 217 (CA 1, 2000).

## 13.12 Domestic Violence as a Factor in Judicial Proceedings Under the Hague Convention

This section will consider domestic violence as a factor in the following contexts under the Convention:

- Was there a wrongful taking or retention of the child?
- Was a particular nation the place of the child's "habitual residence?"
- Is there a grave risk that returning the child would expose him or her to physical or psychological harm?

## A. Wrongful Taking or Retention

The Hague Convention makes no mention of domestic violence as a factor in determining whether an alleged taking or retention was wrongful. A parent's motivation for removing a child from his or her habitual residence is not relevant to a determination of wrongfulness — the Convention defines a "wrongful" taking as one that violates the petitioner's rights to custody that were being exercised at the time of removal. Convention, Article 3. In *Friedrich v Friedrich,* 983 F2d 1396 (CA 6, 1993) (hereinafter "*Friedrich I*"), the U.S. Court of Appeals for the Sixth Circuit described the "central core of matters at which the Hague Convention was aimed" as "situations where one parent attempts to settle a difficult family situation, and obtain an advantage in any possible future custody struggle, by returning to the parent's native country...." 983 F2d at 1402. In such cases, the Convention's primary assumption is that the merits of the parties' custody dispute are best decided in the state where the child habitually resides. This assumption governs regardless of whether a party has taken a child to perpetrate or flee from abuse. As the Sixth Circuit panel noted in *Friedrich I, supra*:

> "[A] United States district court has the authority to determine the merits of an abduction claim, but not the merits of the underlying custody claim. It is important to understand that 'wrongful removal' is a legal term strictly defined in the Convention. It does not require an ad hoc determination or a balancing of the equities. Such action...would be contrary to a primary purpose of the Convention: to preserve the status quo and to deter parents from crossing international boundaries in search of a more sympathetic court." 983 F2d at 1400.

Although the court may not use evidence of abuse to "balance the equities" between the parties to a Convention case, domestic violence may be relevant to the *existence* of a parent's custody rights in cases arising under the Convention, and thus to the question of whether a taking was wrongful. The question whether a parent has custody rights is to be resolved using the choice of law rules of the state of habitual residence. See *Whallon v Lynn*, 230 F3d 450, 455-456 (CA 1, 2000), and *Feder v Evans-Feder,* 63 F3d 217, 225 (CA 3, 1995). If the applicable law imposes limits on a parent's custody rights as a result of domestic violence, U.S. courts are bound to apply such laws. Convention, Article 3a. See also *Friedrich v Friedrich,* 78 F3d 1060, 1066, n 6 (CA 6, 1996) (hereinafter "*Friedrich II*") (noting that a U.S. court would be bound to apply a foreign law that expressly defines acts constituting the "exercise" of custody for purposes of the Convention). Thus, a U.S. court might be justified in finding that removal of a child is not wrongful under the Convention where the petitioner had assaulted the respondent in violation of a court order or law in the state of habitual residence that conditions access to

children on the petitioner's cessation of violence. Such findings must be based on explicit provisions of the law of the habitual residence state, however. In determining whether domestic violence affects the existence of parental rights, a U.S. court must remember that its role is not to make traditional custody decisions, but to determine the proper jurisdiction for making them. Examination of the best interests of a child under traditional U.S. state laws violates the aim and spirit of the convention. *Ciotola v Fiocca*, 86 Ohio Misc 2d 24; 684 NE2d 763, 769-770 (1997).

## B. "Habitual Residence" of the Child

In determining a child's "habitual residence," United States courts have considered whether a parent has been forced to reside with the child in a location against his or her will. In *In re Ponath*, 829 F Supp 363, 366 (CD Utah, 1993), a German citizen forced his wife (a U.S. citizen) to remain in Germany with their U.S.-born child "by means of verbal, emotional and physical abuse." As a result of the husband's behavior, the wife and child remained in Germany for ten months against the wife's will. The husband eventually permitted the wife and child to return to the U.S., but later filed a request for return of the child under the Convention. The U.S. District Court denied the husband's petition, finding that the child's habitual residence was in the U.S. The court reasoned:

> "Although it is the habitual residence of the child that must be determined, the desires and actions of the parents cannot be ignored by the court in making that determination when the child was at the time of removal or retention an infant. The concept of habitual residence must...entail some element of voluntariness and purposeful design....In this case, what began as a voluntary visit to petitioner's family in Germany, albeit an extended visit, might be viewed by the court as a change of habitual residence of the minor child but for respondent's intent and desire to return to the United States with the minor child and petitioner's willful obstruction of that purpose....The aim of the Hague Convention is to prevent one parent from obtaining an advantage over the other in any future custody dispute....For the court to grant petitioner's motion, and thereby sanction his behavior in forcing continued residence in Germany upon respondent, and through her, the minor child, would be to thwart a principle purpose of the Hague Convention. In the court's view, coerced residence is not habitual residence within the meaning of the Hague Convention." 829 F Supp at 367-368.

In cases involving coerced residence, the Eighth Circuit's decision in *Nunez-Escudero v Tice-Menley*, 58 F3d 374 (CA 8, 1995) should also be consulted. In that case, a U.S. citizen fled from Mexico with her Mexican-born infant to escape physical, sexual, and verbal abuse at the hands of her Mexican husband. Overruling the district court's denial of the husband's petition for return of the child, the Eighth Circuit panel remanded the case for a determination of the child's habitual residence, finding that the record before it was insufficient in this regard. In response to the wife's assertion that the child was not habitually resident in Mexico because she had been forced to remain there against her will, the panel distinguished *In re Ponath, supra*, as follows:

> "In *Ponath*...the child was born and lived in the United States before visiting Germany where his father forced the family to remain....In contrast, here, the baby was born and lived only in Mexico until his mother fled to the United States. To say that the child's habitual residence derived from his mother would be inconsistent with the Convention, for it would reward an abducting parent and create an impermissible presumption that the child's habitual residence is wherever the mother happens to be." 58 F3d at 379.

## C. "Grave Risk" of Exposing the Child to Harm

In Convention cases where domestic violence is at issue, an important question is the applicability of the Article 13b exception for situations where there is "a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." U.S. courts have not taken a consistent approach in weighing domestic abuse as a factor under Article 13b.

The U.S. Court of Appeals for the Sixth Circuit has articulated in dicta a narrow, two-pronged standard for evaluating when a child faces a grave risk of harm for purposes of the Convention:

> "[A] grave risk of harm for the purposes of the Convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute — e.g., returning the child to a zone of war, famine, or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection." *Friedrich II, supra*, 78 F3d at 1069. See also *Freier v Freier*, 969 F Supp 436, 442 (ED Mich, 1996).

The Sixth Circuit revisited this standard in *March v Levine*, 249 F2d 462 (CA 6, 2001). Here a state court had entered a default judgment as a sanction for a discovery violation in a wrongful death action against the father of two children. The children's maternal grandparents brought the wrongful death action, alleging that the father had caused the death of the children's mother, who disappeared and was never found. No criminal charges were filed against the father. The father moved to Mexico with the children prior to the filing of the wrongful death action. The maternal grandparents abducted the children during visitation, and the father sought their return under the Convention. The U.S. district court in Tennessee found that the grandparents had failed to establish by clear and convincing evidence that return would subject the children to a "grave risk of harm." 136 F Supp 2d 831, 854 (MD Tenn, 2000). The U.S. Court of Appeals agreed:

> "Even assuming that the default judgment would be upheld on appeal, that it should be given preclusive effect in the proceedings, and that it is sufficient to show that there is some risk of harm to the children in being returned to March, this default judgment is not clear and convincing evidence that there is a *grave* risk of harm to the children in being returned to their father." 249 F3d at 472. [Emphasis in original.]

The Court of Appeals also found no evidence that the father had abused or neglected the children, and the Mexican authorities had not been shown to be unwilling or incapable of protecting the children. *Id*.

The U.S. Court of Appeals for the Eighth Circuit has also taken a narrow view of the relevance of domestic violence to the question whether return poses a "grave risk of harm" to the child. This Court regards domestic violence as a matter for consideration in the underlying custody dispute, which must be resolved in the country of the child's habitual residence. In *Nunez-Escudero v Tice-Menley,* 58 F3d 374 (CA 8, 1995), the respondent, the mother of an infant child born in Mexico, fled to the U.S. from her husband's home in Mexico. In response to the husband's petition for return of the child under the Convention, the respondent invoked the Article 13b "grave risk of harm" exception by way of affidavits stating that her husband and his family had physically, sexually, and verbally abused her, and treated her as a prisoner in her home. Without deciding whether Mexico was the child's habitual residence, the district court refused to order the child's return to Mexico, finding that there was a grave risk that return would expose him to physical and psychological harm and place him in an intolerable situation. In reaching its conclusion, the district court based its decision on the child's young age, his dependency on his mother, and the possibility that he would be institutionalized in Mexico as a result of the custody action between his parents; the district court did not base its decision on the respondent's allegations of domestic violence.

On appeal, the Eighth Circuit panel reversed and remanded the case for further proceedings, finding that it could not rule on the district court's decision regarding the Article 13b exception without a prior finding as to the child's habitual residence. However, the panel stated that only "specific evidence" of "severe potential harm to the child" will trigger the Article 13b exception. 58 F3d at 376-377. Applying this standard, the panel noted that the district court incorrectly factored the possible separation of the child from his mother in assessing whether his return to Mexico would constitute a grave risk of harm under the Article 13b exception. The panel further found that most of the evidence of domestic abuse was "general and concern[ing] the problems between [the wife], her husband and father-in-law," and thus "irrelevant to the Article 13b inquiry." 58 F3d at 377. It explained as follows:

> "The Article 13b inquiry does not include an adjudication of the underlying custody dispute....It is not relevant to this Convention exception who is the better parent in the long run, or whether [the wife] had good reason to leave her home in Mexico and terminate her marriage to [the husband] or whether [the wife] will suffer if the child she abducted is returned to Mexico." 58 F3d at 377.

In contrast, the U.S Court of Appeals for the First Circuit has concluded that domestic violence may pose a "grave risk of harm" to children under Article 13b. In *Walsh v Walsh,* 221 F3d 204 (CA 1, 2000), the petitioner-father, while living in the U.S., severely physically abused the respondent-mother over a long period, at times in front of the children. The petitioner also assaulted others and fled the U.S. to Ireland after being charged with threatening to kill

a neighbor. After the respondent and children joined the petitioner in Ireland, the domestic violence continued, despite the entry of a protective order by an Irish court. Respondent-mother returned to the U.S. with the children, one of whom was diagnosed with post-traumatic stress disorder. The U.S. district court granted the father's petition, concluding that the respondent had failed to meet her burden of proof under Article 13b. The district court also required several "undertakings," including a "no-contact" order if respondent returned to Ireland with the children. The district court concluded that the evidence did not reveal an immediate and serious threat to the children's physical safety that could not be dealt with by Irish authorities. Regarding psychological harm, the district court found that the disorders suffered by one of the children might be mitigated by the lack of exposure to the physical abuse of the respondent-mother. The U.S. Court of Appeals reversed, finding that the district court erred in requiring evidence of immediate harm. *Id*, at 218. Furthermore, the Court of Appeals found that because the petitioner had disobeyed court orders in the U.S. and Ireland, the risk of harm to the children would not be mitigated by the undertakings ordered by the district court. *Id*, at 220-221.* The Court summarized the district court's errors as follows:

*Undertakings are addressed in Section 13.13.

> "In our view, the district court committed several fundamental errors: it inappropriately discounted the grave risk of physical and psychological harm to children in cases of spousal abuse; it failed to credit John's more generalized pattern of violence, including violence directed at his own children; and it gave insufficient weight to John's chronic disobedience of court orders. The quantum here of risked harm, both physical and psychological, is high. There is ample evidence that John has been and can be extremely violent and that he cannot control his temper. There is a clear and long history of spousal abuse, and of fights with and threats against persons other than his wife. These include John's threat to kill his neighbor...and his fight with his son Michael." *Id*, at 219-220.

A subsequent decision by the First Circuit Court of Appeals relied on *Walsh,* but found that allegations of verbal abuse and a single incident of shoving established an insufficient risk of harm to meet the requirements of Article 13b. In *Whallon v Lynn*, 230 F3d 450, 460 (CA 1, 2000), there were no allegations that the petitioner-father abused the daughter who was the subject of the petition. Although the respondent-mother and daughter were held at gunpoint by unknown persons as they attempted to leave Mexico, the Court upheld the district court's finding that the father's denial of responsibility for the incident was credible.

The Second Circuit Court of Appeals has interpreted the "grave risk of harm" exception broadly in a case involving domestic violence. In *Blondin v Dubois*, 238 F3d 153, 163 (CA 2, 2001), the Court held that "a 'grave risk of psychological harm,' even construed narrowly, undoubtedly encompasses an 'almost certain[]' recurrence of traumatic stress disorder." In *Blondin*, the respondent-mother presented uncontested expert testimony that the children would face a recurrence of traumatic stress disorder if returned to France, the site of physical and psychological abuse of them and their mother. *Id,* at 159. The Court also concluded that the district court properly considered whether the children were settled in their new environment, and the objection to

returning to France by one of the children, aged eight, in deciding whether Article 13b applied. *Id*, at 164, 166-167. The Court noted, however, that these factors are not conclusive of the issue of "grave risk of harm." *Id*.

A federal district court in California has liberally construed the "grave risk of harm" exception to include domestic violence as a factor in the court's decision whether to return a child. In *Krishna v Krishna*, 1997 WL 195439 (No C-97-0021 SC, ND Cal, April 11, 1997), the petitioner sought return of his child after his wife took the child from Australia to the U.S. Although the petitioner met his threshold burden under the Convention, the district court denied his petition based on the Article 13b exception for situations posing a grave threat of harm to the child. The court found that the respondent had left Australia with her child after allegedly suffering regular and serious beatings at the hands of the petitioner. The respondent had come to the U.S. not to "forum shop," but to find family and financial support. Based on these findings, the court held:

> "In light of the prior history of alleged abuse and discord that has existed between the parties, the court finds that the return of the child to Australia would pose a grave risk to the child's well being. Although there is little evidence that relocation of the child to Australia poses a grave threat of physical harm to the child, the court finds that there is compelling evidence establishing the potential for serious psychological harm....Return of the child to Australia would only serve to reinstate the child in a highly stressful and psychologically damaging environment, particularly because [respondent] has relatively limited familial support in Australia. Moreover, the child is currently well settled in the United States where a divorce proceeding has been filed and can be expedited to minimize the costs to [petitioner]."

## 13.13 Entering Orders That Minimize the Risk to the Child in Hague Convention Cases

Once proceedings have been initiated under the Convention, Article 7b provides for appropriate "provisional measures," which shall be taken "to prevent further harm to the child or prejudice to interested parties." 42 USC 11604(a) empowers courts deciding cases under the Convention to "take or cause to be taken measures under Federal or State law...to protect the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition." A court's authority to take such measures is limited by a requirement that the "applicable requirements of State law" be satisfied before a child is removed from the person having physical custody. 42 USC 11604(b).

The State Department's legal analysis of the Convention makes the following comment regarding Article 7b:

> "To prevent further harm to the child, the [Central Authority] would normally call upon the state welfare agency to take whatever protective measures are appropriate and available consistent with

> that state's child abuse and neglect laws. The [Central Authority], either directly or with the help of state authorities, may seek a written agreement from the abductor (and possibly from the applicant as well) not to remove the child from the jurisdiction pending procedures aimed at return of the child. Bonds or other forms of security may be required."

If a court decides that a child must be returned to its country of habitual residence under the Convention, it need not limit its involvement in the case to a bare statement that return is ordered. In *Feder v Evans-Feder,* 63 F3d 217, 226 (CA 3, 1995) the U.S. Court of Appeals for the Third Circuit noted that in appropriate circumstances, courts may ameliorate any short-term harm to the child by making return contingent upon "undertakings" from the petitioning parent. See also *Walsh v Walsh,* 221 F3d 204, 217-218 (CA 1, 2000). Such "undertakings" may include:

- A requirement that the petitioner pay for the respondent and child to travel to the country where the child habitually resides.
- A requirement that the petitioner make appropriate housing arrangements for the respondent and child in the country where the child habitually resides.
- A requirement that the petitioner pay living expenses for the respondent and child in the country of the child's habitual residence.
- Orders that the petitioner have no contact with the respondent if the respondent returns to the country of the child's habitual residence.
- Orders that the petitioner will have no contact or limited (e.g., supervised) contact with the children once they return to the country of the child's habitual residence.

If implementation of such undertakings is necessary to avoid grave risk to the child, the petitioned court may need to investigate whether they would be enforceable in the country of the child's habitual residence. See *Walsh v Walsh*, *supra*, 221 F3d at 219.

In *Blondin v Dubois*, 238 F3d 153, 158-161 (CA 2, 2001), the U.S. Court of Appeals for the Second Circuit upheld a district court's findings that no "undertakings" by the parties could sufficiently mitigate the psychological harm that the children would suffer upon being returned to the country where they and their mother were abused.

In cases where return of a child is mandated despite serious safety concerns, one scholar has suggested that courts consider sending the child to a "safe harbor" until the custody dispute can be resolved in the country of habitual residence. This "safe harbor" might be the location of the parent who took the child from its habitual residence. In cases involving allegations of domestic violence, a "safe harbor" provision might protect a child and fleeing parent in the refuge state while the courts of the habitual residence state take evidence regarding the effect that the alleged abuse should have on rights of access to the child. Comment, *Domestic Violence: Is It Being Sanctioned By the Hague Convention?* 4 Southwest Journal of Law and Trade in the Americas 71, 83 (1997), citing Hilton, *Dreaming the Impossible Dream: Responding to a Petition Under the Convention on the Civil Aspects of International Child Abduction,* in North American Symposium on International Child Abduction, 6, 13 (September 30, 1993).